

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel.)
W. A. DREW EDMONDSON, in his capacity as)
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OKLAHOMA and OKLAHOMA SECRETARY)
OF THE ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the TRUSTEE FOR NATURAL)
RESOURCES FOR THE STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

05-CV-0329 TCK-SAJ

TYSON FOODS, INC., TYSON POULTRY, INC.,)
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)
AVIAGEN, INC., CAL-MAINE FOODS, INC.,)
CAL-MAINE FARMS, INC., CARGILL, INC.,)
CARGILL TURKEY PRODUCTION, LLC,)
GEORGE'S, INC., GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)
and WILLOW BROOK FOODS, INC.,)

Defendants.)

TYSON FOODS, INC., TYSON POULTRY, INC.,)
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)
GEORGE'S, INC., GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)
and WILLOW BROOK FOODS, INC.,)

Third Party Plaintiffs,)

vs.)

City of Tahlequah, *et al.*,)

Third Party Defendants)

**DEFENDANTS/THIRD PARTY PLAINTIFFS' REPLY
TO THE BERRY GROUP'S RESPONSE IN OPPOSITION
TO DEFENDANTS/THIRD PARTY PLAINTIFFS' OPPOSED
MOTION FOR LEAVE TO FILE AMENDED THIRD PARTY COMPLAINT**

Defendants/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., ("Third Party Plaintiffs") hereby submit their Reply to The Berry Group's Response in Opposition to Defendants/Third Party Plaintiffs' Opposed Motion for Leave to File Amended Third Party Complaint pursuant to Fed. R. Civ. P. 15(a). (DKT # 816) ["Motion for Leave"].¹

ARGUMENT

The Berry Group has in large part adopted the arguments and authorities cited in the Plaintiff's Response to Defendants/Third Party Plaintiffs' Opposed Motion for Leave to File Amended Third Party Complaint (DKT #841) in their Response to the Motion for Leave. Therefore, in the interest of brevity, Third Party Plaintiffs incorporate their Reply to Plaintiffs' Response (DKT #858) as though fully set forth herein. However, the Berry Group has raised two additional issues, which Third Party Plaintiffs deem it necessary to address.

In their Response, the Berry Group argues that "the Defendants and their agents"² have admittedly disposed of poultry litter in the watershed and that because the Third Party Complaint and proposed Amended Third Party Complaint do not contain allegations that any of the Third Party Defendants which make up the Berry Group

¹ By filing their Reply to Plaintiffs' Response to their Motion for Leave and arguing same before the Honorable Magistrate Judge Joyner, the Third Party Plaintiffs expressly do not waive any objection that they may have to any Order entered by the Federal Magistrate dismissing their third party claims in contravention to Article III of the United States Constitution. *See TPO, Inc. v. McMillen*, 460 F.2 348 (7th Cir. 1972).

² Defendants have denied that their activities within the watershed constitute disposal, and moreover, have denied that an agency relationship exists between them and their independent contract growers.

engaged or contributed in “the disposal of poultry litter within the IRW,” then the Third Party Complaint should be dismissed. (DKT # 843, pg. 2) The Berry Group, not unlike the Plaintiffs, seek to limit the breadth of this lawsuit, which involves the alleged injury to the “biota, lands, waters and sediments” in the 1,000,000 plus acre Illinois River Watershed (“IRW”) to one industry. However, what both the Berry Group and Plaintiffs fail to realize is that because Plaintiffs have sued only members of the poultry industry seeking to hold them jointly and severally liable for the entirety of this alleged “common injury,” both federal and Oklahoma law provide to the accused jointly and severally liable defendants the right to implead third parties “who may be liable to the third-party plaintiff[s] for all or part of the plaintiffs’ claim....” Fed R. Civ. P. 14(a), and Okla. Stat. tit. 12, § 832(A). This right to join third parties can take the form of contribution actions, as well as additional direct claims for liability.

Finally, the Berry Group argues that they have been prejudiced by the Third Party Plaintiffs’ filing of the Third Party Complaint, and that dismissal of those claims should be immediate because they have already incurred substantial attorneys’ fees and costs, and will be required to incur substantially more. Assuming that incurring attorneys’ fees and costs associated with this action is prejudicial, then it is a prejudice that Third Party Plaintiffs have also been forced to endure as a result of Plaintiffs’ First Amended Complaint. Had Plaintiffs developed a responsible watershed management strategy addressing all sources of alleged pollution within the IRW, rather than pursuing through contingency fee litigation only the Defendants for all of the alleged problems within the IRW, neither Third Party Plaintiffs nor the Berry Group would have been forced to incur the substantial fees and costs in defending the claims in this action. Notwithstanding this

alleged prejudice, this argument fails to provide a basis for the denial of Third Party Plaintiffs' Motion for Leave pursuant to Fed. R. Civ. P. 15(a).

CONCLUSION

Third Party Plaintiffs have clearly met their burden to show that their proposed Amended Third Party Complaint is authorized under Fed. R. Civ. P. 15(a). In opposing the Motion for Leave, the Berry Group has failed to carry its steep burden at this stage to prove permitting the proposed amendment to the Third Party Complaint would be futile, and therefore, Third Party Plaintiffs' respectfully suggest that their Motion for Leave to file their Amended Third Party Complaint should be granted.

Respectfully submitted,

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